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IN THE

Supreme Court of the United States

..... TERM, 1966

NO. ~~1271~~ 239

PENN TOWNSHIP

v.

YECKO BROS., George C. Schmidt, Ada A. Schmidt, and all other interested persons of Penn Township, Butler County, Pennsylvania

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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_____

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners, YECKO BROS., pray that a Writ of Certiorari issue to review the decision and judgment of the Supreme Court of Pennsylvania reversing the Order of the Common Pleas Court which held that petitioners had a legal right to establish their business and that the zoning ordinance subsequently passed had no retroactive effect.

_____

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Pennsylvania is reported at 420 Pa. 386, 217 A.2d 171, and appears in the Appendix, page 27. The opinions of the Court of Common Pleas of Butler County (unreported) are included at pages 55a and 73a, respectively, of the Record as printed for the Court below, nine copies of which Record are filed herewith.

JURISDICTION

The decision of the Pennsylvania Court sought to be reviewed was entered January 4, 1966. The Order denying Reargument was entered March 24, 1966. The jurisdiction of your Honorable Court is invoked under Title 28 U.S.C., Section 1257 (3).

QUESTIONS INVOLVED

Is it a violation of due process of the Fourteenth Amendment to the Constitution of the United States for the Pennsylvania Supreme Court, on a purported finding of "total lack of good faith", to prohibit petitioner from using his property for a legal and lawful purpose where at the time of the commencement of the use, to-wit, July 27, 1962, there was no zoning ordinance or ordinance requiring a use or occupancy permit in effect and where for approximately three years prior to the use of said property the township had been considering, rejecting, and reconsidering a zoning ordinance and on June 28, 1962, had advertised a public hearing to be held July 17, 1962, to consider the adoption of a proposed

zoning ordinance and subsequently, after another legal notice on August 1, 1962, enacted an ordinance on August 13, 1962, which did not become legally effective until August 23, 1962?

Is the administration of a local zoning ordinance which makes such ordinance effective as to one person on a date different than such ordinance is effective as to all other parties a violation of the equal protection clause of the Fourteenth Amendment?

Is it a violation of the equal protection clause and the due process clause of the Fourteenth Amendment to administer a local zoning ordinance as to make its effective date dependent upon the alleged motives of the owner of property in making use of his property?

Is a determination by the Courts restricting the use of property in the absence of an effective statutory provision a violation of the due process clause of the Fourteenth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The applicable provisions of the Fourteenth Amendment to the Federal Constitution and Article 1, Section 9, of the Pennsylvania Constitution are reproduced in the Appendix.

STATEMENT OF THE CASE

On July 2, 1962, George C. Schmidt and Ada A. Schmidt entered into a written agreement with Albert S. Yecko and Mary A. Yecko, his wife, to sell and convey a parcel of land in Penn Township, Butler County, Pennsylvania. The agreement was subsequently assigned to Yecko Bros., who presented themselves at the first meeting of the Township Supervisors, to-wit, on July 9, 1962, for the purpose of obtaining a use and occupancy permit, believing that a permit was necessary. At that time, there was no provision for obtaining a use and occupancy permit for the establishment of any business therein, but the Yeckos were not so advised. They were advised to see Mr. Norman Patterson, Chairman of the Planning and Zoning Commission.

For a period of about three years, the Township of Penn, a second class township, considered the advisability of adopting a zoning ordinance. One such ordinance was drafted and presented and, after hearings, was rejected. Subsequently, a zoning ordinance (Ordinance No. 39) was advertised on June 28, 1962, and enacted by the Township Supervisors on August 13, 1962, to be effective August 23, 1962; the Schmidt-Yecko property was zoned "C 2" Highway Commercial District; an auto wrecking and parts business is not a permissible use of the Schmidt-Yecko property under this Ordinance and the zoning map.

On December 5, 1952, the Township of Penn enacted an ordinance prohibiting the use of any property for automobile graveyards or junkyards or yards or places for the storage and parking of used automobiles or automobile parts, declaring the same to be a public nuisance.

The ordinance was clearly unconstitutional and was declared unconstitutional in this case both by the Lower Court and by the Supreme Court.

On July 27, 1962, Yecko Bros. occupied the property by installing a bus as an office, storing wrecked automobiles, and erecting a sign "Yecko Bros. Auto Parts". They continued to occupy said property until August 4, 1962, and during that time from 8 to 12 customers per day visited their place of business, and during that period they sold, delivered, and received payment for merchandise amounting to $109.50.

On August 4, 1962, Sarah Moody, an individual resident of Penn Township, filed a bill in equity against the Yeckos and Schmidts, citing the above mentioned ordinance of December 5, 1952, and praying for an injunction. A preliminary injunction was granted on August 4, 1962.

Subsequently, on October 24, 1962, 121 additional residents of Penn Township filed a petition to intervene as parties plaintiff, which was allowed by the Court of Common Pleas of Butler County, Pennsylvania. On October 29, 1962, Penn Township filed a petition to intervene as a party plaintiff but introduced a new cause of action, to-wit, Ordinance No. 39, the zoning ordinance which became effective August 23, 1962, which by its terms prohibited automobile wrecking yards on the premises occupied by Yecko Bros.

On October 29, 1962, after a hearing, the Lower Court dissolved the preliminary injunction and the Yeckos reopened their place of business which had been closed since the preliminary injunction was issued on August 4, 1962.

The Lower Court in its Opinion (56a) held:

"An owner of property is still entitled in Pennsylvania to certain unalienable constitutional rights of liberty and property. These include a right to use his land in any way he desires, provided he does not violate the law or create a nuisance per se."

The Lower Court further held (70a):

"At the time defendants established their business, there was no legal restriction upon defendants in the use of their property, nor any legal requirement for a use or occupancy permit."

"The defendants had a legal right to establish their business on July 27, 1962."

"The Zoning Ordinance effective August 23, 1962, has no retroactive effect."

On appeal, the Supreme Court reversed the Lower Court in the following language:

"The facts in this litigation demonstrate the total lack of good faith on the part of the appellees. The buyer and seller both recognized that the proposed use of the property as an automobile parts business or wrecking and parts yard had been proscribed by the ten year old 1952 ordinance of the township. There is no doubt that appellees had been advised that the ordinance of 1952, while an expression of the public policy of the township and while still unrepealed, was, nevertheless, not a constitutional enactment. However, appellees also knew of the township's intention to adopt a new and enforceable zoning ordinance. Their action on July 27, 1962 in occupying and using the land was a calculated de-

vice resorted to in the belief that the 1952 ordinance was unconstitutional and that the proposed zoning ordinance properly regulating land use and proscribing an automobile graveyard, being but two weeks from enactment and one month from effectiveness, had to be circumvented by quick action on their part. Their haste to occupy the new property without any approval or permit, their bringing a used bus on the property as an office, their resourcefulness in painting a sign and placing a wrecked automobile on the premises, their consummation of but $109.50 of business all indicate the lack of good faith required by these cases. On the contrary, they illustrate a contrived series of maneuvers designed to circumvent a duly authorized ordinance so as to perpetuate a nonconforming use after the effective date of the ordinance. This planned circumvention evidencing bad faith becomes most apparent when it is recognized that all this took place in the face of an existing ordinance not yet set aside which prohibited this activity and before the appellees had obtained legal title to the property. No doctrine of fairness can be invoked to support appellees' position under these circumstances. Hence, the decree of the lower court is reversed and the record returned to the lower court for the entry of a decree in conformity with this opinion. "Decree reversed at appellees' cost."

ARGUMENT

The decision of the Pennsylvania Supreme Court deprives petitioners of their rights under the Fourteenth Amendment to the Constitution in that they were denied the lawful use of their property without due process of law, and they were denied equal protection of the laws. At the outset, it should be stated that there are very few, if any, factual disputes in this case, most of the material and relevant facts being stipulated. See R. 46a to 54a, incl.

At issue in this case is whether the Supreme Court of Pennsylvania, by its decision, may prevent the lawful use of property where the property was utilized beginning July 27, 1962, for a lawful business and subsequent thereto, the township passed its first zoning ordinance, which became effective August 23, 1962. The Supreme Court of Pennsylvania in its Opinion attributed bad faith to the petitioners in starting their business in the face of an admittedly unconstitutional ordinance, and stated that the petitioners knew of the township's intention to adopt a new and enforceable ordinance.

I. Petitioners Were Denied Equal Protection of the Laws in That the Zoning Ordinance Which Penn Township Enacted Effective August 23, 1962, Became Effective on That Date to All Property Owners of the Township Except Petitioners Herein, as to Whom It Became Effective July 27, 1962.

The basic principles governing the constitutional rights of due process and equal protection of the laws has been set forth in the case of *Truax v. Corrigan*, 257 U.S. 312, at pages 332 and 333, and these statements constitute the foundation of all rights guaranteed by our Constitution to all persons. The Court there stated:

> "The due process clause, brought down from Magna Charta, was found in the early state constitutions, and later in the Fifth Amendment to the Federal Constitution as a limitation upon the executive, legislative and judicial powers of the Federal Government, while the equality clause does not appear in the Fifth Amendment and so does not apply to congressional legislation. The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Hurtado v. California, 110 U.S. 516, 535. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which the Con-

gress or the legislature may not withhold. Our whole system of law is predicated on the general, fundamental principle of equality of application of the law. 'All men are equal before the law,' 'This is a government of laws and not of men,' 'No man is above the law,' are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute and apply laws. But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.

"The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. Mr. Justice Field, delivering the opinion of this court in Barbier v. Connolly, 113 U.S. 27, 32, of the equality clause, said — 'Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.' In Hayes v. Missouri, 120 U.S. 68, the court speaking through the same Justice said the Fourteenth Amendment 'does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. *It merely requires*

that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.' Thus the guaranty was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class. (emphasis ours)

"Mr. Justice Matthews, in Yick Wo v. Hopkins, 118 U.S. 356, 369, speaking for the court of both the due process and the equality clause of the Fourteenth Amendment, said:

'These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; *and the equal protection of the laws is a pledge of the protection of equal laws.*'"

Until August 23, 1962, Penn Township had no zoning ordinance and therefore could enforce no zoning regulations. It is apparent that a zoning ordinance looks to the future and cannot operate retroactively. In *Bane v. Twp. of Pontiac,* 343 Mich. 481 — 72 N.W. 2d 134, the Court said:

"We have repeatedly held that zoning ordinances may not operate retroactively upon vested property

rights acquired prior to their enactment, but may only operate in futuro."

In *Jones v. City of Los Angeles,* 127 California App. 213, P. 2d 784, the Court said:

"Zoning regulations look to the future, not to the past and cannot be made retroactive."

In *Dobbins v. Los Angeles,* 195 U.S. 223, this Court said:

" 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the *equal protection* of the laws, they must be deemed unconstitutional and void. Gibbons v. Ogden, 9 Wheat. 1, 210; Sinnot v. Davenport, 22 How. 227, 243; Missouri, Kansas & Texas Ry. v. Haber, 169 U.S. 613, 626." (emphasis ours)

In *Schlientz v. City of N. Platte,* 172 Neb. 477 — 110 N.W. 2d 58 (1961), the Court said:

"In City of Omaha v. Glissman, 151 Neb. 895, 39 N.W. 2d 828-830, this Court said: 'A zoning ordinance may not operate retroactively to deprive a property owner of his previously vested rights, that is, a zoning ordinance cannot deprive the owner of a use to which his property was put before the enactment of the ordinance.' "

In *State v. Leighton,* 172 N.E. 2d 715, the Court said:

> "The ordinance, as to relators, is retroactive and constituted the taking of property without due process of law."

II. Petitioners Were Denied Due Process of Law in That the Decision of the Supreme Court of Pennsylvania Prevented Them From Making a Lawful Use of Their Property on July 27, 1962, in a Township Where Its Initial Zoning Ordinance Did Not Become Effective Until August 23, 1962.

Municipal corporations have no inherent power to enact zoning ordinances, the power to do so being exclusively that of the legislature, which must authorize the enactment of such ordinances. The legislature of the Commonwealth of Pennsylvania authorized second class townships under certain conditions to pass zoning ordinances. See *Act of May 1, 1933,* P.L. 103, Art. 20, Sec. 2001, as amended, Purdon 53, 67001. To pass a legally enforceable zoning ordinance, the procedure outlined by the legislature must be followed. In this case, no attack is made upon the procedure followed, or of the provisions of the ordinance. When the ordinance was passed by Penn Township, it was advertised to be effective August 23, 1962. The unconstitutional act in this case is the ruling of the Pennsylvania Supreme Court, not the ordinance of the township. In *Kline v. City of Harrisburg,* 362 Pa. 438, 68 A.2d 182 (1949), it was held:

> "Of course, it is well settled that zoning is a proper exercise of the police power and has a direct relation to the preservation of health, safety and gen-

eral welfare. It is to be remembered, however, as was stated in White's Appeal, 1926, 287 Pa. 259, 266, 134 A. 409, 412, 53 A.L.R. 1215 that 'while (zoning) regulations may not physically take the property, they do so regulate its use as to deprive the owner of a substantial right therein without compensation.' Powers with such serious consequences should be exercised only in the manner designated by the legislature.

"In Re Gilfillan's Permit, 1927, 291 Pa. 358, 361, 140 A. 136, 137 Justice Frazer, speaking for the Court said: 'But inasmuch as the natural effect of ordinances of this description is to limit private rights in the interest of public welfare, the exercise of the power must be carefully guarded * * *.'

"Although Justice Frazer was referring to the court's duty to 'carefully guard' the power to prevent an unreasonable exercise of it, what he said is equally applicable to the duty of the legislature to 'carefully guard' the power to zone. This the legislature has done by detailing a procedure which it says must be followed before any regulations or restrictions are imposed by the city."

Although steps were taken to promulgate the zoning ordinance, the important consideration in this case is that the adoption of the ordinance and its effective date was *subsequent* to the petitioners' use of the property.

Even prior to the legal notice which ultimately resulted in the passage of the zoning ordinance, petitioners had attended a meeting of the Township Supervisors intending to secure a use and occupancy permit, believing

that a permit was necessary. They were not advised that there was no ordinance of the township requiring a use and occupancy permit, but were advised to see Mr. Norman Patterson, Chairman of the Planning and Zoning Commission. This was obviously done to delay the Yeckos from establishing their business, and it did delay petitioners from establishing their business until July 27, 1962.

On July 17, 1962, after advertisement, the Supervisors met to consider the adoption of a proposed zoning ordinance, but they did not pass a zoning ordinance at that meeting. *On July 27, 1962, when petitioner established their business on the property, there was no ordinance of the township requiring a use and occupancy permit, there was no zoning ordinance in effect, and there was no pending meeting to consider a proposed zoning ordinance.* On August 1, 1962, notice was given of a meeting on August 13th to *again consider* a zoning ordinance for the township.

On August 4, 1962, Sarah Moody, a private citizen of the township, filed a bill in equity seeking an injunction against petitioners to restrain petitioners from maintaining their business because of an ordinance of December 5, 1952, which prohibited all automobile wrecking yards in the township. The Court of Common Pleas of Butler County granted a preliminary injunction. The ordinance under which the injunction was granted was obviously unconstitutional. Both the Lower Court and the Supreme Court of Pennsylvania so held.

From July 27, 1962, when petitioners moved upon the property and established their busines, until August 4, 1962, when the preliminary injunction was granted,

they sold 15 items totaling $109.50 and the number of customers visiting their place of business each day varied from 8 to 12. The Lower Court found that all requirements for establishing a business were satisfied:

> "In this case, these requirements were all satisfied. The room, although mobile, was adapted for the purpose and it was used for the purpose of conducting the business. The number of persons in the courtroom during the trial of this matter gave the clearest possible evidence that 'there was such a utilization of the premises that they might be known in the neighborhood' as being employed for the purpose of a junk yard or automobile graveyard." (R. 59a, 60a)

In *26 P.L.E. Municipal Corporation,* Sec. 450, we find:

> "An 'existing use' has been held to mean the utilization of the premises so that they may be known in the neighborhood as being employed for a given purpose."

As to the constitutional right of one to use his property, the Pennsylvania Supreme Court said, in *Lhormer v. Bowen,* 410 Pa. 508, 188 A.2d 747 (1962):

> "Appellant stresses the fact that the plaintiffs having not secured the permit suffered no detriment through expenditures in reliance thereof. This overlooks the fact that the plaintiffs will suffer substantially through the loss of the opportunity to sell the property for a sizeable sum of money. It also ignores that which is very fundamental. As stated in Lened Homes, Inc. v. Philadelphia Dep't of Licenses, 386 Pa. at page 54, 123 A.2d at page 407: 'An owner

of property is still entitled in Pennsylvania to certain unalienable constitutional rights of liberty and property. These include a right to use his own home (or property) in any way he desires, provided he does not (1) violate any provision of the Federal and State Constitutions; or (2) create a nuisance; or (3) violate any covenant, restriction or easement; or (4) violate any laws or zoning or police regulations which are constitutional.' See also, Andress v. Zoning Board, 410 Pa. 77, 188 A. 2d 709 (1963)."

In *Kline v. Harrisburg,* supra, a case relied upon by the Lower Court but ignored in the Opinion of the Supreme Court, these facts were that the City of Harrisburg passed what it termed an "interim" zoning ordinance, which was not enacted in accordance with the requirements of statutes relating to zoning ordinances, and in a very exhaustive opinion by Judge Woodside, affirmed by the Supreme Court of Pennsylvania, the interim zoning ordinance was held to be of no effect and the Court ordered the issuance of a building permit. In that case, the Court said:

"The record of the case indicates that the City has been in the process of preparing a zoning Ordinance since May 15, 1945, a period of not over four years, and that 'the work has not matured to the point where public hearings can be had' before the City Planning Commission. As a matter of fact a 'final' zoning ordinance may never be enacted. There is no duty upon the Council to enact any zoning Ordinance. There is nothing contained in the so-called interim Ordinance by which the present Council even pledges itself to the enactment of a 'final' Ordinance."

The Court of Common Pleas of Butler County cited *Yocum v. Power,* 398 Pa. 223, which case was also ignored in the Opinion of our Supreme Court, which held:

"An unpassed bill in City Council, as one in the State Legislature, has no more governmental authority than a scribbled note on the back of an envelope in the pocket of a legislator.

"If all business in a City or State, touched upon by pending bills, had to mark time until final action was taken on the contemplated legislation, chaos would grip City and Commonwealth."

* * * *

"As nothing can be more unjust in criminal law than an ex post facto law, so nothing is more frowned upon in civil law than a procedure which has the effect of making illegal what the law has already recognized as legal. No lover of American sports would approve of changing ground rules to favor one side or the other after the game had begun."

The Lower Court held (R. 60a):

"Such a proposed ordinance 'has no more governmental authority than a scribbled note on the back of an envelope in the pocket of a legislator.' Yocum v. Power, 398 Pa. 223, 226. This proposition is well illustrated by the history of the present ordinance as this township had already been considering such an ordinance for at least three years. The citizens of the community are not required to sit around and wait for a municipal legislative body to act before proceding to make a legal use of their land. If land owners are bound to take note of pending legisla-

tion, then our legislators should define the term for them."

The Lower Court made a visual inspection of the property and held (R. 68a) that the business of petitioners was in keeping with the other business establishments in the area, and said:

"27. The business establishments are generally unattractive and do nothing to enhance the beauty of the neighborhood. The desirability of this area has already been largely destroyed by the unattractive nature of the business establishments and by the very heavy traffic on Route 8."

The Pennsylvania Supreme Court attributed "lack of good faith" to petitioners in establishing an automobile wrecking yard in the township in the fact of an admittedly unconstitutional 1952 ordinance. The Court, in effect, held that public policy can be established by unconstitutional means. Surely, public policy must always be constitutional, not unconstitutional.

The above holding is directly contrary to the recognized and established constitutional rights of property owners as expounded by that Court in *Lhormer v. Bowen,* supra, where they said:

"An owner of property is still entitled in Pennsylvania to certain unalienable constitutional rights of liberty and property. These include a right to use his own home (or property) in any way he desires, provided he does not . . . (4) violate any laws or zoning or police regulations which are *constitutional.*" (emphasis ours)

Counsel for petitioners knows of no rule of law respecting the public policy of townships. Webster's New International Dictionary, Second Edition, defines public policy as "The policy recognized or established by the *state* in determining what acts are unlawful as being injurious to the public or contrary to public good." (emphasis ours)

The Opinion continued:

"However, appellees also knew of the township's intention to adopt a new and enforceable zoning ordinance."

The above is not in accordance with the facts. The only thing known by petitioners was an intention by the township to "consider" a zoning ordinance. The Lower Court said (R. 73a, 74a):

"The defendants contend that they established a nonconforming use of their property by commencing their business on July 27, 1962, and by doing a substantial amount of business prior to the effective date of the ordinance."

"The Township contends that no such nonconforming use was established because the use was commenced on the land in the face of what they describe as a pending ordinance. It is a fact that a notice was published on June 28, 1962, declaring the *intention of Penn Township to consider* such an ordinance on July 17, 1962. On July 17, 1962, no action was taken by Penn Township. On August 1, 1962, a like notice was given of Penn Township's *intention to consider* such an ordinance on the 13th day of August, 1962, when as indicated above they did pass such an ordinance." (emphasis ours)

There was no duty upon the Supervisors to enact a zoning ordinance. The Supervisors had rejected one ordinance that was drafted and presented, and there was no certainty that any ordinance would be enacted. The Lower Court further held (R. 74a):

> "It is the Court's opinion that whatever may have been the defendants' responsibilities with reference to the Township's declaration of intention to act on July 17, 1962, that this responsibility ended with the Township's failure to act on that day. It is to be noted that Penn Township had been considering, rejecting and reconsidering like ordinances for three years and they have failed to act affirmatively during these three years. Certainly the land owner is not bound to leave his land unused forever just because the Township is thinking about passing an ordinance which may affect him."

The Supreme Court of Pennsylvania further held:

> "Their action on July 27, 1962, in occupying and using the land was a calculated device resorted to in the belief that the 1952 ordinance was unconstitutional and that the proposed zoning ordinance properly regulating land use and proscribing an automobile graveyard, being but two weeks from enactment and one month from effectiveness, had to be circumvented by quick action on their part."

In fact, on July 27, 1962, there were no pending proceedings. The meeting of July 17 did not result in the enactment of a zoning ordinance, and there was no notice of any other meeting. On August 1, an advertisement appeared fixing a meeting for August 13 to again *consider the adoption of a zoning ordinance.* Therefore,

there was nothing pending relating to a zoning ordinance at the time petitioners established their business on July 27, 1962.

Petitioners were ready to establish their business on July 2, 1962, the date of the agreement for the purchase of the property. They appeared before the Supervisors at their first meeting thereafter and the STIPULATIONS, page 47a, reveal:

> "That the defendants, Yecko Bros., entered into a contract for the purchase of the premises and, believing that it was necessary to obtain a use and occupancy permit, they appeared before the Supervisors of the Township for the purpose of obtaining a use and occupancy permit, on July 9, 1962. At the time of said appearance, there was no provision in the ordinance of Penn Township for obtaining a use and occupancy permit for the establishment of any business in Penn Township, but the said defendants were not so advised and, on the contrary, were advised to contact Mr. Norman Patterson, Chairman of the Planning and Zoning Commission."

The Pennsylvania Supreme Court continues:

> "Their haste to occupy the property without any approval or permit, their bringing a used bus on the property as an office, their resourcefulness in painting a sign and placing a wrecked automobile on the premises, their consummation of but $109.50 of business all indicate a lack of good faith required by these cases."

The above holding has no basis in fact. The Pennsylvania Supreme Court knew it was impossible to ob-

tain an approval or permit, because there was no provision in the ordinances of Penn Township for any such permit.

Does the occupation of one's property without an approval or permit when none was obtainable, the bringing of a used bus on the property as an office, the resourcefulness in painting a sign saying "Yecko Bros. Auto Parts" and placing a wrecked automobile on the premises, and the consummation of but $109.50 of business in the first eight days (including Sunday) of their business career, indicate lack of good faith?

It was the Supreme Court of Pennsylvania which initially stamped these actions as "lack of good faith" and "bad faith". Nowhere in the pleadings or in the Brief filed in the Supreme Court of Pennsylvania or in the Lower Court was that charge made and, of course, the Supreme Court made a misstatement when it said "placing a wrecked automobile on the premises." The testimony shows that wrecked automobiles were placed upon the premises.

Is the amount of business transacted by petitioners the test, or is the utilization of the property for the purpose intended the test? Does not the utilization of the property for the business intended rather than the amount of business transacted control? The Lower Court held, page 70a:

> "At the time defendants established their business, there was no legal restriction upon defendants in the use of their property, nor any legal requirement for a use or occupancy permit.
>
> "The defendants had a legal right to establish their business on July 27, 1962."

And they further found, page 59a:

> "The room, although mobile, was adapted for the purpose and it was used for the purpose of conducting the business. The number of persons in the courtroom during the trial of this matter gave the clearest possible evidence that 'there was such a utilization of the premises that they might be known in the neighborhood' as being employed for the purpose of a junk yard or automobile graveyard."

The Pennsylvania Supreme Court continues:

> "On the contrary, they illustrate a contrived series of maneuvers designed to circumvent a duly authorized ordinance so as to perpetuate a nonconforming use after the effective date of the ordinance. This planned circumvention evidencing bad faith becomes most apparent when it is recognized that all this took place in the face of an existing ordinance not yet set aside which prohibited this activity and before the appellees had obtained legal title to the property."

A reading of the stipulations of fact in this case, page R. 46a-R. 53a, together with the findings and opinion of the Lower Court completely refute what the Pennsylvania Supreme Court designates "a contrived series of maneuvers designed to circumvent a duly authorized ordinance so as to perpetuate a nonconforming use after the effective date of the ordinance."

It is clear that the Pennsylvania Court's decision thwarts petitioners in their constitutional right to use their property for their business and gives the zoning ordinance of Penn Township an effective date not al-

lowed by the legislature of the Commonwealth of Pennsylvania, and brings petitioners under the provisions of that ordinance which the township could not legally bring into being until August 23, 1962.

The Pennsylvania Supreme Court has promulgated a theory for municipal corporations where zoning ordinances have been in effect and a change therein is in process of being enacted, whereby they impute bad faith to anyone seeking a building permit after the ordinance for the change has been introduced in the legislative body. There is a distinction between that line of cases and the instant case. Here, no zoning ordinance was in existence at the time a use and occupancy permit was sought, and there was no provision in the township for the issuance of a use and occupancy permit, so the petitioners had a right to go upon the property and establish their business.

In the other line of cases, a building permit or a use and occupancy permit must be obtained before going on the property and the change or changes in the zoning ordinance have been introduced in the legislative body and are set for final passage.

The Pennsylvania Supreme Court evaded any discussion of petitioners' constitutional rights, although the Lower Court made mention of them. The Petition for Reargument in the Pennsylvania Supreme Court contended that the decision of that Court constituted an unlawful taking of property without due process, and is in violation of the Constitution of Pennsylvania and the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

The decision of the Pennsylvania Supreme Court, if affirmed, would permit a Court *by imputation of bad faith* to deprive property owners of their constitutional rights. This case is of extreme importance, not only to petitioners, but to all Pennsylvanians.

This decision should be reversed to confirm the principle that Courts may not disregard constitutional rights of private property owners.

The decision of the Pennsylvania Supreme Court would make the effective date of an ordinance not a fixed and specific one, but dependent upon the *alleged* motives of those affected by such legislation.

CONCLUSION

The decision of the Pennsylvania Supreme Court must be reversed; petitioners were deprived of their constitutional rights under due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and under Section 9 of Article 1 of the Pennsylvania Constitution, and the action of the Pennsylvania Supreme Court was based not upon any recognized rule of law, but upon the imputation of bad faith where none existed.

Respectfully submitted,

HARRISON & LOUIK
DAVID M. HARRISON
SAUL J. BERNSTEIN
Attorneys for Appellants

APPENDIX A

Opinion of the Supreme Court of Pennsylvania

PENN TOWNSHIP, Intervening Plaintiff, Appellant,

v.

YECKO BROS., George C. Schmidt, Ada A. Schmidt, and all other interested persons of Penn Township, Butler County, Pennsylvania

Supreme Court of Pennsylvania.

Jan. 4, 1966.

Rehearing Denied March 24, 1966.

Before BELL, C. J., and MUSMANNO, JONES, COHEN, EAGEN, O'BRIEN and ROBERTS, JJ.

COHEN, Justice.

For a period of approximately three years the Township of Penn, appellant, considered the advisability of adopting a zoning ordinance. Subsequently, on June 28, 1962, a zoning ordinance (Ord. No. 39) was advertised. It was enacted by the township supervisors on August 13, 1962, to be effective on August 23, 1962.

On July 2, 1962, George Schmidt and Ada Schmidt entered into a written agreement with Albert Yecko and Mary Yecko, whereby they agreed to sell four acres of land to the Yeckos. The agreement contained a provision that if there was an ordinance of the township in existence prohibiting "a used automobile parts business or wrecking and parts yard business being conducted in

a building," all the Yeckos' hand money was to be returned and the agreement was to become null and void.

On July 9, 1962, the appellees, Yecko Bros., appeared at a public meeting of the township supervisors and requested approval for the establishment of an automobile wrecking and parts business. They were advised to contact the chairman of the planning and zoning commission since all such proposals had to be submitted to that commission for its approval pending rejection or adoption of the zoning ordinance by the board of supervisors. (Yecko Bros. were also advised that a public hearing on the proposed zoning ordinance was to be held on July 17, 1962). Without obtaining this approval, on July 27, 1962, Yecko Bros. moved on the property in question, installed a used bus as an office, placed wrecked automobiles on the premises and erected a sign "Yecko Bros. Automobile Parts." Between that date and August 4, 1962, Yecko Bros. transacted business by selling and delivering parts for used automobiles and did a total business of $109.50.

On August 4, 1962, Sara Moody, a private citizen of Penn Township filed a complaint in equity seeking a preliminary and permanent injunction against the appellees restraining them from maintaining an automobile wrecking and parts yard. She based her complaint upon an ordinance of the Township of Penn enacted December 5, 1952, and still in effect, entitled, "An Ordinance to promote the public health, safety, morals, and general welfare of Penn Township," which ordinance prohibited anywhere in Penn Township any automobile graveyard or junkyard for the storage or parking of used automobile or automobile parts and decreed same to be a public nuisance.

Appendix A.

On August 4, 1962, the lower court granted a preliminary injunction enjoining the present appellees from establishing and maintaining their automobile junkyard. On October 29, 1962, a hearing was held and the preliminary injunction granted on August 4, 1962, was dissolved. At this hearing the Township of Penn appeared and received permission to intervene as a party plaintiff. Subsequently, as an intervening plaintiff, Penn Township, filed its complaint and averred that on August 13, 1962, it had enacted a zoning ordinance which became effective August 23, 1962, and which did not permit an automobile wrecking yard on the property of the appellees.

On October 29, 1962, after the hearing at which the preliminary injunction was dissolved, the Yeckos consummated the purchase of the property from the Schmidts. At the hearing itself the lower court determined that because no special damages to the individual plaintiffs (Sara Moody et al) were alleged or proved, they had no standing in a court of equity to restrain a public nuisance. The lower court further held that the ordinance of 1952 which prohibited the establishment of any automobile graveyard was unconstitutional as an unreasonable restriction on the right to conduct a lawful business.

In a subsequent opinion the lower court determined that the appellees had established a nonconforming use of their property by commencing their business on July 27, 1962, and that since this nonconforming use had been created and was in existence prior to the adoption of the zoning ordinance, it was a protected use and could continue.

[1] The lower court's determination was based upon the rationale that a nonconforming use existing at the time of passage of a zoning ordinance is protected and cannot be extinguished without violating the rights of the property owner. However, the lower court failed to recognize that before it was called upon to determine the extent of protection which should be afforded a nonconforming use, it was necessary to determine if there was a nonconforming use obtained legally and exercised in good faith and thus entitled to protection.

[2] We have held in a long line of cases that even when an applicant is issued a building permit, unless he proceeds in good faith to incur substantial obligations in reliance thereon, the permit may be vacated or revoked if an amendment to the zoning ordinance or subsequent adoption of such an ordinance prohibits the proposed use of the land. The rule established by these cases was designed to prevent the creation of what would become a nonconforming use after the effective date of a pending zoning ordinance. It has been generally acknowledged that when a property owner in good faith has expended money or incurred liability in reliance on a building permit which he obtained under an existing ordinance, he acquires a vested right which entitles him to protection against a change in the zoning ordinance.

[3] The rule that arises from these cases[1] is that a property owner who is able to demonstrate (1) that he

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1. Herskovitz v. Irwin, 299 Pa. 155, 149 A. 195 (1930); Lower Merion Township v. Frankel, 358 Pa. 430, 57 A.2d 900 (1948); A. N. "Ab" Young Company Zoning Case, 360 Pa. 429, 61 A.2d 839 (1948); Dunlap Appeal, 370 Pa. 31, 87 A.2d 299 (1952); City of Harrisburg v. Pass, 372 Pa. 318, 93 A.2d 447 (1953); A. J. Aberman,

has obtained a valid building permit under the old zoning ordinance, (2) that he got it in good faith—that is to say without "racing" to get it before a proposed change was made in the zoning ordinance—and (3) that in good faith he spent money or incurred liabilities in reliance on his building permit has acquired a vested right and need not conform with the zoning ordinance as changed.

Throughout the cases in which the rule appears there runs the dominating theme of fairness and good faith. In the Shapiro case the municipality refused a permit to establish an activity permitted under the existing zoning ordinance and thereafter the municipality interposed contrived objections to the obtaining of such a permit. We held that the applicant was entitled to a permit since it was the municipality which acted in bad faith. This Court, in its opinion on pages 629-630 of 377 Pa. 105 A.2d 299, however, went on to indicate that it still was incumbent upon the permittee, in order to succeed, to act in good faith. The same rule of fairness seems to permeate our determination in the Lened Homes, Inc. case, supra. On the other hand, A. J. Aberman, Inc. supra, and Shender, supra, are cases which demonstrate lack of good faith on the part of the property owner so that we refused to permit the continuation of the nonconforming use.

Inc. v. City of New Kensington, 377 Pa. 520, 105 A.2d 586 (1954); Shapiro v. Zoning Board of Adjustment, 377 Pa. 621, 105 A.2d 299 (1954); Lened Homes, Inc. v. Philadelphia Department of Licenses and Inspections, 386 Pa. 50, 123 A.2d 406 (1956); Shender v. Zoning Bd. of Adjustment, 388 Pa. 265, 131 A.2d 90 (1957); Hertrick Appeal, 391 Pa. 148, 137 A.2d 310 (1958); Verratti v. Ridley Township, 416 Pa. 242, 206 A.2d 13 (1965).

[4] The facts in this litigation demonstrate the total lack of good faith on the part of the appellees. The buyer and seller both recognized that the proposed use of the property as an automobile parts business or wrecking and parts yard had been proscribed by the ten year old 1952 ordinance of the township. There is no doubt that appellees had been advised that the ordinance of 1952, while an expression of the public policy of the township and while still unrepealed, was nevertheless, not a constitutional enactment. However, appellees also knew of the township's intention to adopt a new and enforceable zoning ordinance. Their action on July 27, 1962 in occupying and using the land was a calculated device resorted to in the belief that the 1952 ordinance was unconstitutional and that the proposed zoning ordinance properly regulating land use and proscribing an automobile graveyard, being but two weeks from enactment and one month from effectiveness, had to be circumvented by quick action on their part. Their haste to occupy the property without any approval or permit, their bringing a used bus on the property as an office, their resourcefulness in painting a sign and placing a wrecked automobile on the premises, their consummation of but $109.50 of business all indicate the lack of good faith required by these cases. On the contrary, they illustrate a contrived series of maneuvers designed to circumvent a duly authorized ordinance so as to perpetuate a nonconforming use after the effective date of the ordinance. This planned circumvention evidencing bad faith becomes most apparent when it is recognized that all this took place in the face of an existing ordinance not yet set aside which prohibited this activity and before the appellees had obtained legal title to the

property. No doctrine of fairness can be invoked to support appellees' position under these circumstances. Hence, the decree of the lower court is reversed and the record returned to the lower court for the entry of a decree in conformity with this opinion.

Decree reversed at appellees' cost.

ROBERTS, J., concurs in the result.

Petition for Reargument

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

YECKO BROS., GEORGE C. SCHMIDT, and ADA A. SCHMIDT, appellees, by their attorney, David M. Harrison, respectfully request this Honorable Court to grant a reargument in this matter and set forth the following reasons in support thereof.

1. The Court, in its opinion filed January 4, 1966, overlooks and misapprehends the following matters of record:

a. The Court states that the consummation of only $109.50 of business by the appellee, Yecko Bros., is an indication of lack of good faith required to establish a valid nonconforming use, but the Court overlooked the fact that this sum was earned in the first eight days of business and that on the eighth day, a preliminary injunction enjoined said appellees from continuing business (Record, pp. 53a, 54a, 48a). A minimum of eight (8) customers per day dealt with the appellees (Record, p. 53a).

b. The Court assumes in its opinion (page 2) that approval of the Planning and Zoning Commission was

necessary before the appellees could use the subject property for their auto wrecking and parts business, and the Court condemns the appellees for occupying the property "without any approval or permit" (Opinion, p. 6) and cites the failure to obtain a permit or approval as evidence of a lack of good faith by appellees.

The Court overlooked the fact that counsel for the Township of Penn stipulated on the record and the lower court found as a fact that there was no requirement then existing in the Township of Penn for obtaining a use or occupancy permit (Record, p. 47a).

Furthermore, the Planning and Zoning Commission under the Second Class Township Code (Act of 1933, May 1, P.L. 103, as amended and supplemented, Secs. 2006 and 2051) acts in an advisory capacity only, and has no legislative or administrative power to grant or withhold permission to a property owner to use his property.

The Court misapprehended the functions of and power of the Planning and Zoning Commission when it assigned a duty to the appellees to obtain a permit not required of them, or receive approval from a body not authorized by law to grant or withhold approval.

c. The Court misapprehended the scope of the appellees use of the premises during the time it conducted its business, in that the Court on page 6 of its opinion, used the singular noun "automobile", when it states:

> "Their haste to occupy the property without any approval or permit, their bringing a used bus on the property as an office, their resourcefulness in paint-

ing a sign and placing a *wrecked automobile* on the premises. . ." (emphasis added)

The record is not clear as to the exact number of automobiles used by appellees in their business, but that more than one is involved appears in the record; e.g., the testimony of Norman Patterson (Record, p. 31a) indicates more than four cars appeared in the photograph identified as Plaintiff's Exhibit No. 1-B.

d. The Court incorrectly reasoned that the appellees believed that the proposed ordinance would proscribe automobile wrecking yards. The record contains no evidence from which it can be inferred that the Township Supervisors indicated to the appellees that their proposed business would be prohibited by the new ordinance. On the contrary, after inquiry to the Supervisors about establishing an auto wrecking and parts business and after advising them of the pending land sales agreement connected with same, the Supervisors failed to tell the appellees that such a use would be prohibited in the proposed ordinance and instead referred appellees to the Chairman of the Planning and Zoning Commission, who legally had no power to act in the matter one way or the other (Record, Stipulation V, pp. 47a, 48a).

e. The Court stresses in its opinion (page 6) that the zoning ordinance was passed about two weeks after appellees began their business, and attributes bad faith to the appellees in commencing business such a short time prior to adoption of the ordinance. The Court overlooked the fact that appellees had no way of knowing when the ordinance might be adopted and, if the Supervisors' past record was indicative of anything, it foreboded inaction, vacillation and uncertainty, since the

Township had had such a matter under consideration for more than three years and had already once refused to finally adopt such an ordinance (See Record, p. 62a). The lower court did not find appellees guilty of bad faith but, on the contrary, intimated that the Township Supervisors were not frank with Yecko Bros. when appellees appeared before them on July 9, 1962. On page 64a, the Court said:

> "The Yeckos were not advised by the Supervisors that there was no provision in the ordinances of Penn Township to obtain a use and occupancy permits."

f. The Court overlooked the difference between the fact situations in all the cases cited in the footnote and the case before the Court. All of the cases cited in the opinion involve actions by property owners taken under color of a valid existing zoning ordinance, where a permit was required under such existing ordinance.

In the case at bar, it is stipulated of record and found as a fact by the lower court, that no permit was required. Thus, no constructive notice of the terms of any ordinance are imposed upon the property owner until after the same is published as required by law. Until the ordinance is adopted, no property owner is limited in the use of his property and may legally and rightfully make the most advantageous economic use without expectation of penalty.

2. The Order of the Court is legally in error, in that:

a. The decision of this Court, in depriving a property owner of the use of his property at a time when there was no legal or valid restriction on such use, con-

stitutes an unlawful taking of property without due process and is in violation of the Constitution of Pennsylvania and the Constitution of the United States.

b. The decision of this Court would make the effective date of an ordinance not a fixed and specific one, but dependent upon the alleged motives of those affected by such legislation.

c. The decision of this Court is directly contrary to the decisions of this Court in Kline v. Harrisburg, 362 Pa. 438; Yocum v. Power, 398 Pa. 223; and Lhormer v. Bowen, 410 Pa. 201.

3. That this case is one of first impression in this Commonwealth, and that serious constitutional questions are involved in the application of zoning regulations and the effective dates of zoning regulations.

WHEREFORE, your petitioners pray your Honorable Court to be heard by way of reargument so that particular attention may be accorded to the matters herein set forth.

And they will ever pray.

A copy of the Court's Opinion and Order of January 4, 1966, is attached.

HARRISON & LOUIK
DAVID M. HARRISON
Attorneys for Appellant

Appendix A.

Answer to Petition for Reargument

To the Honorable, the Judges of Said Court:

The Answer of Penn Township to the Petition for Reargument respectfully sets forth the following reasons for dismissing said petition:

1a. In answer to the statement contained in paragraph 1a, it is respectfully pointed out that the statement is completely out of context as reference to the opinion shows that the statement as to the amount of business consummated by appellee is merely one of a series of acts all adding up to an indication of lack of good faith.

Beginning with the last paragraph on page five of the Opinion, the following additional reasons are shown:

1. "The buyer and seller both recognized that the proposed use of the property as an automobile parts business or wrecking and parts yard had been proscribed by the ten year old 1952 ordinance of the township."

2. ". . . Appellees also knew of the township's intention to adopt a new and enforceable zoning ordinance."

3. "Their (Appellees') action on July 27, 1962 in occupying and using the land was a calculated device resorted to in the belief that the 1952 ordinance was unconstitutional and that the proposed zoning ordinance properly regulating land use and proscribing an automobile graveyard, being but two weeks from enactment and one from effectiveness, had to be circumvented by quick action on their part."

4. "Their haste to occupy the property."

5. "Bringing a bus on the property as an office."

6. "Their resourcefulness in painting a sign and placing a used automobile on the premises."

7. "Their consummation of but $109.50 of business."

8. "Their calling upon the Supervisors for approval of their proposed operation and failure to even apply for an approval."

There are many other facts on the record which the court had before it which were considered and which when viewed with the above acts lead to the same conclusion, namely:

Providing in the written agreement of sale that if there was an ordinance of the township in existence prohibiting "a used automobile parts business or wrecking and parts yard business being conducted in a building" all Yeckos' hand money was to be returned and the agreement was to be null and void. This indicated they knew of the pendency of the ordinance.

1b. In answer to paragraph 1b, it is averred that though no formal permit was required of the Planning and Zoning Commission, the Supervisors did require approval of the Commission and so informed them. Yeckos made no attempt whatsoever to obtain this approval though ostensibly they called on the Supervisors for that very reason. (P. 47a)

The Supervisors certainly had power to grant such a permit and to delegate such power to the Planning and Zoning Commission. Good faith on the part of Yeckos

would have prompted a request for it. It has been held that fruitless attempts to obtain a permit are not sufficient. Sheen v. Mencer, 52 D & C. 422.

1c. In answer to paragraph 1c it is averred that undoubtedly the court considered the question with more than one automobile involved as in the first paragraph on page two, the court said "the Yeckos on July 27, 1962, moved a used bus as an office and placed *wrecked automobiles* on the premises and erected a sign 'Yecko Bros. Automobile Parts.'"

1d. In answer to paragraph 1d it is averred that the ordinance was advertised and though they were advised of the pendency of the ordinance and were interested enough to inquire and also to protect themselves in the agreement, the Yeckos totally neglected to examine the ordinance as it appeared in the published advertisement or in the copies on file in the township building.

The stipulations show that Yeckos were instructed to obtain the approval of the Planning and Zoning Commission.

1e. In answer to paragraph 1e, it is averred that the appellees could have inquired at the township building as to the contents of the ordinance and could also have examined the advertisement of the ordinance. These are logical inferences that may be made from the facts in the case. A failure to do what the careful person about to enter into an enterprise which was clearly unwanted in the community as shown by an existing ordinance even though later declared unconstitutional adds to the indication of bad faith on the part of appellees.

1f. In answer to paragraph 1f it is averred that the fact situation in the cases cited by the court are very similar and quite parallel on the primary question involved, namely, the necessity for the existence of good faith. Certainly Harrisburg v. Pass, 372 Pa. 318 cannot be said to be non-applicable.

The stipulation referred to merely shows the Zoning Ordinance had not yet passed and therefore at the time no formal permit could issue under the Ordinance. No particular form of permit is required by the law. The supervisors indicated an approval was necessary.

2a. In answer to paragraph 2a, it is averred that there is no vested right in Yeckos in the property. They did not acquire a vested right in the property by an agreement dated July 2, 1962, in which they provided:

> "If there is an Ordinance in Penn Township, Butler County (Butler, R. D. #6, Pa.) Pennsylvania against a used auto parts business or wrecking yard being conducted in a building to be erected such as George C. Schmidts, then all hand money shall be returned to the Parties of the Second Part and this transaction is null and void."

At this time they had paid only $500.00 on the total consideration. The first substantial payment—$2500.00 was to be paid when a deed was delivered (R. 52a) and a mortgage given for the balance. Appellees did not take a deed for this property until quite some time after the ordinance was passed.

Euclid Realty Co. v. Village of Ambler, 272 U. S. 365, (1926) answers the "due process" and constitutional question.

Appendix A.

In Mestre v. City of Atlanta, 255 Fed. (2) 401 (1958) the City of Atlanta, Ga., adopted a re-zoning ordinance which re-zoned the City in its entirety. Plaintiffs claiming the rezoning affected their vested property rights asked for an injunction. Held in a per curiam opinion. The plaintiffs have no vested property rights in virtue of the comprehensive zoning ordinance and the general rule is that considerations of financial loss in private property are not sufficient to outweigh the necessity for legitimate exercise of the police power of a municipality . . ."

2b. Paragraph 2b is argumentative.

2c. Paragraph 2c is argumentative, the cases cited being distinguishable, (B. 13) Yokum v. Power, 398 Pa. 223; Lhormer v. Bowen, 410 Pa. 201.

3. The case is not one of first impression as Harrisburg v. Pass, 372 Pa. 318, 93 A (2) 477, disposed of the precise questions in 1953. (11, 12, 22).

WHEREFORE, the Court is respectfully requested to refuse the prayer of the petition.

Respectfully submitted,

CARMEN V. MARINARO

Attorney for Penn Township

Appendix A.

Order Denying Petition

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PATRICK N. BOLSINGER
Prothonotary

HELEN D. STEELE
Deputy Prothonotary

Pittsburgh, Pa.
March 24, 1966

Carmen V. Marinaro, Esq.
Mellon Bank Building
Butler, Pennsylvania

Re: Penn Township etc. v. Yecko Bros., et al.
No. 152 March Term, 1965

Dear Mr. Marinaro:

Please be advised that this Court has entered the following order on the Petition for Reargument filed in the above entitled matter:

"March 24, 1966
Petition denied.
Per Curiam."

Very truly yours,

PATRICK N. BOLSINGER
Prothonotary

PNB:1b
cc: David M. Harrison, Esq.
Saul J. Bernstein, Esq.

APPENDIX B

Constitutional Provisions Involved

FOURTEENTH AMENDMENT—DUE PROCESS CLAUSE

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U. S. Const. Amdt. 14.

PENNSYLVANIA CONSTITUTION

Art. 1, Sec. 9. * * * nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land.

STATE COURTS; APPEAL; CERTIORARI

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929." 28 U.S.C., Section 1257 (2), (3).

Office-Supreme Court, U.S.
FILED
JUL 16 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. [redacted] 239

PENN TOWNSHIP

v.

YECKO BROS., George C. Schmidt, Ada A. Schmidt, and all other interested persons of Penn Township, Butler County, Pennsylvania

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

CARMEN V. MARINARO
Attorney for Appellee

311 Mellon National Bank Building
Butler, Pennsylvania

SMITH BROS. CO. INC., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 1421

PENN TOWNSHIP

v.

YECKO BROS., George C. Schmidt, Ada A. Schmidt, and all other interested persons of Penn Township, Butler County, Pennsylvania

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

COUNTER STATEMENT OF QUESTIONS INVOLVED

I. Did the opening of a junkyard and the sale of 15 used automobile parts for prices ranging from $1.00 to $3.00 over a period of eight days without any substantial investment made, excepting the placing of a used bus on wheels and a few junked automobiles on the premises and without obtaining a permit to do so, establish such a non-conforming use a few days before the actual passage of a zoning ordinance, as would entitle defendants to continue the operation of a business prohibited under

the ordinance after they had been notified that such a business was prohibited under the pending ordinance?

II. Did the action of the Supreme Court of Pennsylvania after it had found that defendants had actual notice on June 28, 1952, before occupying the land, that the zoning ordinance prohibiting such activities would be passed on August 13 and that their action was a calculated device to circumvent the ordinance, before they had legal title to the land but after they had occupied it, amount to a violation of the equal protection clause and due process clause of the Fourteenth Amendment to the United States Constitution?

COUNTER STATEMENT OF THE CASE

In this action in equity, appellant, Penn Township, a township of the second class located in Butler County, Pennsylvania, was intervenor in a proceeding in which 121 individual plaintiffs asked for an injunction against the defendant's Yecko Bros. operation of an automobile junkyard or "graveyard."

The defendants, Yecko Bros., operate the junkyard on land owned by George C. Schmidt and Ada Schmidt with whom they had an agreement in writing to purchase the land if they would be permitted to operate the yard.

The action by Penn Township is based on a violation of a zoning ordinance passed by the township on August 23, 1962, which prohibits the operation of such a business in the location in question, classified by the ordinance as a "C" or "Roadside Commercial District."

Some years prior to June 28, 1962, Penn Township had created a Planning Commission. This commission made recommendations for a zoning ordinance for the township. The commission held many public meetings to discuss and revise the terms of the ordinance of which public notice was always given.

On June 28, 1962, Ordinance No. 39 was publicly advertised for adoption at a meeting of the township supervisors to be held on August 13, 1962 and to become effective ten days thereafter, August 23, 1962.

On July 2, 1962, George C. Schmidt and Ada A. Schmidt entered into a written agreement with Albert S. Yecko, wherein they agreed to sell and convey to the latter four acres of land on the eastern side of New

Route 8, a four lane highway running from Pittsburgh to Butler which contained a provision that if there was an ordinance of the township in existence prohibiting "a used auto parts business or wrecking yard being conducted in a building" all hand money was to be returned and the agreement rendered null and void. One of the defendants, Albert Yecko, was a party to this agreement (P. 55a).

On July 9, 1962, the Yecko Brothers, Albert and Phillip, appeared at a public meeting of the township supervisors and requested approval for the establishing and operation of an auto wrecking and parts business. They were referred to Norman Patterson, Chairman of the Planning and Zoning Commission, since a public meeting was advertised for July 17, 1962, and such requests should be made to the commission pending rejection or adoption of the ordinance.

Without obtaining this approval Yecko Bros. occupied the property on July 27, 1962, by installing a bus used as an office, storing a few wrecked automobiles and erecting a sign bearing the words "Yecko Bros. Auto Parts."

A preliminary injunction was issued on August 4, 1962, on the complaint of the individual plaintiffs, claiming the defendants were in violation of Ordinance No. 39, of the Township prohibiting auto junkyards, enjoining defendants from operating that type of business. From July 27 to August 4, defendants sold fifteen small items or parts.

On August 13, 1962, the Zoning Ordinance was enacted.

The Township of Penn on application and complaint averring defendants were violating the provisions of the Zoning Ordinance was permitted to intervene as party plaintiff by order of Judge Rodgers dated October 29, 1962 (P. 39a).

October 29, 1962, a hearing on the Bill for Injunction was held before the Honorable Herman M. Rodgers of Mercer County, specially presiding. Stipulations of fact were entered into by counsel for all parties.

On February 19, 1964, Judge Rodgers in a written opinion and order refused the injunction for the reason that defendants had established their business and there was no legal restriction upon them in the use of their property, since the zoning ordinance had no retroactive effect and the junkyard ordinance was unconstitutional (P. 70a).

Exceptions were filed by the township to certain findings of fact, the failure to find certain conclusions of law requested, and the decree refusing the injunction.

On appeal to the Supreme Court of Pennsylvania the Order of the lower court was reversed in an opinion filed January 4, 1966 to which there was no dissent.

ARGUMENT

I. Petitioners Were Not Denied Equal Protetction by the Zoning Ordinance as They Were Given by Its Terms the Right to Establish in Good Faith a "Non-Conforming Use"—Which They Failed to Do.

The ordinance in question contains a specific exemption for nonconforming uses.

The rule permitting a landowner to continue a nonconforming use of property in a certain area applies only to a lawful existing nonconforming use which existed at the time of passage of the zoning ordinance or regulation, *Hanna v. Board of Adjustment of Forest Hills,* 183 A. (2) 539, 408 Pa. 306.

The Chancellor in discussing the issues reasoned that "the business was operated for 8 days prior to the effective date of the ordinance. Fifteen sales of used auto parts were made in seven days before passage of the ordinance."

In *Ashline v. Bristol Board of Adjustment,* 408 Pa. 245, the Supreme Court said: *"Nor will the manifestly casual use of a property by the owner thereof, inconsistent with the terms of the ordinance and prior to the effective date thereof, commit the premises to a nonconforming use status."* Citing *Kiddy's Appeal,* 294 Pa. 209. We cite the case because the discussion of the second principle involved is exactly in point with our case. The Supreme Court stated it thus:

> "It is contended that at the time of the passage of the Zoning Ordinance on Nov. 28, 1952, and for some time prior thereto, a portion of the land had been used for similar purposes. The court below, which

heard the case de novo, found that the use of the property in this respect was only 'casual and incidental,' *and so minor that it was not sufficient to constitute* a 'nonconforming use.' A reading of the record readily manifests the correctness of this conclusion."

THE RULE FOR ESTABLISHING NONCONFORMING USES-LEGALITY OF CONSTRUCTION OR USE.

"Zoning prohibitions have been regarded as applicable notwithstanding the commencement of operations for the construction of a non-conforming building, or a building to be used for a nonconforming purpose, where the work was *commenced without a permit,* 86 ALR 687, 117 ALR 1117 and continued after enactment of the zoning ordinance in definite and conscientious violation thereof." 86 ALR 687, 58 Am Jur.

This rule operates on all alike.

In the leading case of *City of Harrisburg v. Pass,* 93 A. (2) 477-372 Pa. 318 (1953) the court laid down the rule that "in order to enable an owner to claim such right, (a nonconforming use) he must establish that his expenditures were made in reliance on a building permit previously issued to him, that they were made before the enactment of the ordinance and that they were substantial in amount."

The use cases have developed a rule that a land owner has no vested right to build his proposed use unless he has first obtained a lawful permit and then in good faith, incurred substantial expenditures or liabilities in reliance on the permit, before the adoption of the

prohibitory zoning ordinance of amendment. *Schecter v. Zoning Board of Adjustment,* 395 Pa. 310, 149 A (2) 28; *Shender v. Bd. of Adjustment,* 388 Pa. 265, 131 A (2) 90; *Aberman v. New Kensington,* 377 Pa. 520, 105 A (2) 586; *Harrisburg v. Pass,* 372 Pa. 429, 61 A (2) 839; *Ventresca v. Exley,* 358 Pa. 98, 56 A (2) 210; *Lower Merion v. Frankel,* 358 Pa. 430, 57 A. (2) 900; *Gold v. Building Comm. of Warren Borough,* 334 Pa. 10, 5 A (2) 367; *Herkovitz v. Irwin,* 299 Pa. 155.

There is nothing in this record to establish that Yeckos made any expenditures whatsoever. They had not yet purchased the land. Even the purchase of land itself has never been held to constitute good faith reliance. True, they had entered into an agreement to purchase it but reserved the right to withdraw. The expenditure in that respect must be considered *nil.* They did not prove they purchased any junked automobiles relying on the opening and carrying on of that specific business. They could have been moved from another location.

Aberman, Inc. v. New Kensington, 377 Pa. 530, 105 A (2) 586, indicated that the time of the introduction of the amendment before the legislative body could be important, because the commencement of construction in the face of a proposed amendment could, at the least, be treated as evidence of a lack of good faith.

Yocum v. Power, 398 Pa. 223, 157 A (2) 368 (1959) wherein the opinion says that an unpassed bill has no more governmental authority than "a scribbled note on the back of an envelope in the pocket of the legislator," gives an inkling as to what is meant from the fact that the court distinguishes it from *Aberman v. New Kens-*

ington on the ground that the building permit there was obtained in an effort to circumvent a "general zoning law." Another distinguishing feature of the *Yocum* case may be found in the court's characterization of the proposed amendment as special legislation aimed specifically at the church's property. *The church's permit* prevailed therefore not because it had vested irrevocably, *but because no valid amendment ever came into being to conflict with it.*

STRICT CONSTRUCTION

PROVISIONS FOR CONTINUATION OF NONCONFORMING USES STRICTLY CONSTRUED

"The spirit of zoning ordinances and regulations is to restrict rather than increase any nonconforming uses, and to secure their gradual elimination." C.J.S. "Zoning" Sec. 182, P. 939, *Appeal of Wolfson*, 47 Del. Co. 64,

> Nonconforming uses are a thorn in the side of proper zoning and should not be perpetuated any longer than necessary.
>
> *Beck v. Zoning Bd. of Adjustment*, 69 Pa. Dist. & Co. 438

Therefore, provisions of zoning regulations for continuation of such uses are strictly construed. *Morrison v. Abington Twp.* 77 Montg. 158.

In 1962 in *Hanna v. Board of Adjustment*, 408 Pa. 306, 183 A (2) 539, the Supreme Court approved the decisions of the lower courts when it frowned on nonconforming uses to a degree never before evidenced in the Pennsylvania courts by stating that the POLICY OF THE LAW IS TO RESTRICT THEM TO CONFORMITY AS SPEEDILY AS POSSIBLE.

There cannot therefore be any reason to believe that the requirement that the expenditures were substantial in amount was met. Finally, Yeckos did not obtain a permit. (P. 47a) True, the Chancellor found that at the time defendants established their business there was no legal requirement for a use or occupancy permit (Conclusion No. 10). Certainly in view of the City of Harrisburg case and other Pennsylvania cases so holding, it is respectfully submitted that this Conclusion is clearly in error.

However, we will consider that the fact is that they did ask for a permit. But when they were not granted one they were not excused from procuring one. It has been held that fruitless attempts to obtain a permit are not sufficient. *Sheen v. Mencer*, 52 D & C 422 (1945).

If the defendants had shown that the owner had obtained a valid permit and had either done substantial constructing or incurred substantial liabilities we could have no quarrel with the defendant's rights to continue. They must have shown acts of a substantial nature both as to use and money expended in reliance on a permit. This was not the case here.

A vested right to build a structure which violates a zoning ordinance can only be acquired by securing a building permit and expanding substantial sums in reliance on the permit. *Beverly Bldg. Corp. v. Bd. of Adjustment*, 187 A (2) 567.

Other factors which should be considered in a final determination are:

> Did the defendants act in good faith, or were they merely trying to "beat" the ordinance?

Argument.

Was the fact that Zoning was under consideration given public notice?

The evidence all indicates the defendants were trying to "beat" the ordinance.

For a period of about three years the Township considered the advisability of adopting a zoning ordinance. One such ordinance was drafted and presented and after public hearings, was rejected. Subsequently Ordinance No. 39 was advertised on June 28, 1962, for passage August 13, 1962. A bus and a few cars were placed on the premises after defendants tried unsuccessfully to obtain a permit on July 27, 1962.

On July 9, 1962, the defendants appeared before the Board of Supervisors for the purpose of obtaining a use and occupancy permit. The fact of the pendency of a zoning ordinance was then common knowledge. They were advised by the supervisors to contact Norman Patterson, Chairman of the Planning and Zoning Commission. There they were also advised that a public meeting on the Zoning Ordinance had been advertised for July 17, 1962, and that all proposals such as defendants made must be submitted to the Planning and Zoning Commission for approval, pending rejection or adoption of the Ordinance by the Board of Supervisors. (P. 47a)

It was decided in *Aberman, Inc. v. City of New Kensington,* 377 Pa. 520, 528, 105 A (2) 586, 589, that a municipality may properly refuse a building permit for a land use repugnant to a pending and later enacted zoning ordinance even though application for the permit is made when the intended use conforms to existing regulations.

In considering the evidence one must conclude that there is no question about whether or not defendants knew there was a zoning ordinance in contemplation. Otherwise, why did they go to the trouble of going to the Supervisors and Board of Adjustment for a permit? They only decided to establish this nonconforming use after they were refused the permit. There is no evidence whatsoever that the owner because of the time involved in writing, approving and passing the ordinance was presented with the choice of either postponing construction indefinitely or "taking a chance" with the zoning ordinance. They acted for the first time 17 days before the ordinance was passed, but still did not take title to the land.

ON QUESTION OF HARDSHIP WEIGHING THE INTEREST OF INDIVIDUAL V. THE PUBLC.

Zoning as it affects every piece of property is to some extent retroactive in that it applies to land already owned at the time of the ordinance and the effect of zoning restrictions may be to depreciate sharply the value of a particular plot of land. A good example of this is EUCLID F. AMBLER REALTY CO., 272 U. S. 365 (1926) the leading case upholding zoning as a legitimate exercise of the nonconforming police powers. Here the Supreme Court of the United States sustained zoning restrictions on vacant land directly in the path of Cleveland's industrial development, with the effect that value was reduced from $10,000.00 to $2,500.00 per acre. Although in the ordinary case the effect is not nearly so drastic, the case serves to highlight the possibility of loss when any land is restricted. The economic hardship inherent in retro-

activity cannot be relied on therefore as the sole reason for protecting existing nonconforming uses.

It is recognized by the decisions that zoning is a collection of restrictions and every restriction means a possible loss to someone. "THE EASIEST AND MOST WORKABLE PLACE TO DRAW THE LINE IS AT THE "EXISTING USE."

II. The Owner Seeking to Establish a Nonconforming Use, Acts at His Own Risk, as a Balancing of the Public Interest Against the Private Interest Leads to the Conclusion That Protection Is Justifiable.

The rule which requires substantial construction before an existing use will be declared also seems in the light of the weighing of interests to be justifiable. There is no interference with a going business or good will accompanying removal or even substantial construction.

"A 'nonconforming use' has been defined as the use of a building or land which does not agree with the regulations of the use district in which it is situated.

"Nonconformity may relate to some general use, as for example, the conduct of a business, or it may relate to some more limited aspect of use."

26 P. L. E. Sec. 450

26 Pennsylvania Law Encyclopedia Sec. 450

The lower court was swayed in this case and by the statement which often appears in the cases that "an existing use" is the utilization of premises so that they may be known in the neighborhood as being employed for a given purpose. *Haller Baking Company's Appeal*, 295 Pa. 257 (1928). This is not alone the criterion—see infra.

NOTICE OF PENDING ORDINANCES AND ITS EFFECT.

Shender v. Zoning Board of Adjustment, 388 Pa. 265, 131 A (2) 90 (1957) and *A. J. Aberman v. New Kensington,* 377 Pa. 520, 105 A (2) 586 are consistent with the policy, evidenced in prior decisions of prevent-landowners from getting in under the wire.

In *Gold v. Building Comm. of Warren Borough,* 334 Pa. 10, 5 A (2) 367, the zoning ordinance had passed two readings in Council before the filing of an application for a permit. In *A. M. "A. B." Young Co. Zoning,* 360 Pa. 429, 61 A (2) 839 the ordinance had been introduced in council and public notice given before the filing of the application. In *Aberman v. New Kensington,* 377 Pa. 520, 105 A (2) 586, the commission after public notice held public hearings and then submitted its final report to council recommending the proposed zoning. The application was filed on the same day the report was filed. THE COURT CONCLUDED THAT THE PERMIT WAS SOUGHT NOT IN GOOD FAITH, BUT IN ANTICIPATION OF AND IN AN EFFORT TO CIRCUMVENT THE ORDINANCE. In *Shender v. Zoning Bd. of Adjustment,* 388 Pa. 265, 131 A (2) 90, the absence of a public hearing was held to be of no material effect even though the city had publicly declared its intention to rezone the area some two years before the relevant application was filed.

In this case the very agreement itself shows that defendants knew of the pendency of the ordinance. The legal advertisement for a public meeting appeared in print June 28, 1962. On July 2 they entered into the written agreement to purchase and retained the right to withdraw if an ordinance prevented them from continuing. (P. 49a)

If this nonconforming use is allowed to continue it will have in effect a monopoly in Penn Township, despite the fact that this was a most obvious attempt to get in under the wire. A use must be what is "customarily and habitually done" on the premises and thus cannot be established by occasional acts on the land. In Maryland where the law on nonconforming uses is very similar to Pennsylvania's in the case of *Baltimore v. Shapiro,* 187 Md. 623, 51 A. (2) 273 (1947) it was held that dismantling cars on several occasions did not establish a use.

THE USE ESTABLISHED IN THIS CASE WAS INSUFFICIENT TO ESTABLISH A VESTED RIGHT.

Nonconforming uses are specially created in two ways. First of all, a nonconforming use may be created by the zoning board itself. With this type we are not concerned except to distinguish the law concerning such uses which depend upon the board for continued existence. Secondly, however, nonconforming uses may exist because the use of the property antedates the zoning ordinance.

As to this latter manner of creation the cases branch off in two directions. There are the cases where a bona fide nonconforming use existed prior to the passage of the ordinance. In short, where there is no question that a nonconforming use did exist. The zoning law in these cases always deals with questions of expansion of the use, alteration of plants, abandonment or temporary discontinuance. Then there are those cases like ours where the use is attempted to be established immediately before or immediately after the passage of the ordinance and the question as to whether the use really antedated

the ordinance. Here the question is, did the use actually exist before the ordinance went into existence? If an owner merely had a building permit, but no outstanding contracts and no actual construction on his land at the time the ordinance was passed, there was no use prior to the ordinance. Each case turns on the quantum of proof. This latter it is respectfully submitted, is the category into which the Yecko case falls.

In the discussion of the issues the court found that the requirements of *Haller Baking Company's Appeal*, 295 Pa. 257 (1928) were met. (P. 56a) These requirements in that case were:

> "As, understood in the ordinance, the existing use should mean the utilization of the premises so they may be known in the neighborhood as being employed for a given business, i.e., the conduct of a business.
>
> "Ordinarily, an existing use for business combines two factors: (a) construction of a building or room for the purpose, and (b) employment of the building or room or land within the purpose."

CONCLUSION

The Petitioners Are Not Deprived of Any Rights Under the Fourteenth Amendment to the Constitution

The petitioners owned no property. They entered into an agreement to purchase if the Zoning Ordinance in question was not effective against them. They were fully aware of the ordinance, they knew of its possible effect and provided against the eventualities by making an agreement for purchase only in case the ordinance would not be effective.

> A right cannot be regarded as vested, in the constitutional sense, unless it amounts to something more than a mere expectation of future benefit or interest founded upon an anticipated continuance of the existing general laws. National Carloading Corp. v. Phoenix-El Paso Express, 142 Tex. 141, 176 SW (2) 564, cert. den. 322 U. S. 747, 88 L. Ed 1578, 64 S. Ct. 1156.

Respondent prays that the Writ of Certiorari be refused.

Respectfully submitted,

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